

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 72 OF 2004.

Shri Vante B. Gauns,
Through his Power of Attorney. Appellant.

Versus

Shri Camilo P. Mascarenhas
(deceased) through L.Rs. Respondents.

Shri S.S. Kantak with Ms.G. Bhonsule, Advocates for the Appellant.

Shri S.D. Lotlikar, Senior Advocate with Ms. S. Naik, Advocate for the Respondents.

CORAM: R.M.S. KHANDEPARKAR, J.

DATE: 9th January, 2006.

P.C.:

Heard the Advocates for the respective parties.

2. This appeal is sought to be preferred on the following questions which are formulated as substantial questions of law :-

(A) Whether in terms of Decree no. 43525, the lease of open land is covered by the said decree and whether such lease can be established by receipt of rent ?

(B) Whether Courts below acted contrary to law by holding that

provisions of Decree no. 43525 are not applicable to the case ?

(C) Without prejudice whether the Courts below misread the evidence to hold that the transaction is of a licence and not of a lease ?

(D) Whether the 1st Appellate Court could have ordered eviction of the Appellant without any prayer by the Respondent to the Counter Claim to that effect ?

(E) Whether the 1st Appellate Court misconstrued and misinterpreted the prayers in the Counter Claim ?

(F) Whether such interpretation of the prayer by the 1st Appellate Court is not sustainable since the 1st Appellate Court did not take into consideration the application for amendment of the prayer made by the Respondents and the order of the Trial Court rejecting the amendment ?

(G) Whether the 1st Appellate Court could direct eviction of the Appellant without considering the challenge of the Respondents to the order of Trial Court rejecting the prayer of the Respondents to amend prayer clause of the Counter Claim ?

3. Evidently, the points which are sought to be raised relate to the relief prayed in the counter claim and secondly as regards the nature of the transaction, that is, whether it was a lease or licence.

4. As regards the relief in the counter claim, undisputedly the prayer in the counter claim reads thus :-

“ a) that the Plaintiff be ordered and directed to pay the Defendant No.1 a sum of Rs.5,600/- being the compensation for the wrongful use of the land of this Defendant of the property PERIMOTIVORIL TUKDA situated at Sirvoi, at the rate of Rs.200/- per month for the period 1st January, 1981 till 31st July, 1984 and further compensation at the same rate from August, 1984 onwards till the Plaintiff vacates the trespass by removing the crusher, laterite masonry structure housing the switch board, electric motor etc., as well as the labour shed area all other material including basalt and hand over quiet and vacant possession thereof to the Defendant No. 1. ”

5. It is also an undisputed fact that based on the pleadings of the parties, the trial Court had framed the following issue amongst other issues:-

“ Whether the defendant No.1 is entitled for eviction of the plaintiff and quiet possession of land ? ”

6. It is also a matter of record that the respondent/defendant had filed an application for amendment of the relief and the same was rejected by the trial Court. The Order in that regard was sought to be challenged along

with the appeal filed against the final decree.

7. The contention of the learned Advocate for the appellant is that the relief that was prayed in the counter claim as it stands, does not contain the relief for eviction of the appellant from the suit premises and it is merely a relief for mesne profits till the eviction of the plaintiff from the suit premises; whereas it is the contention on behalf of the respondents that the prayer clause does contain the relief in the nature of eviction and amendment was sought only to clarify the said position in view of the objection sought to be raised at the fag end of the trial and further that the parties had also understood in the course of the trial that the issue regarding eviction of the plaintiff was very much involved in the matter and therefore the issue No.19 was framed by the trial Court. It is also the contention of the learned Advocate for the appellant that once the trial Court had rejected the application for amendment in relation to the prayer clause, unless the findings arrived at in the said order were set aside and the point dealt with by the trial Court was also considered by the appellate Court, the appellate Court could not have arrived at the conclusion about the sufficiency of the prayer relating to eviction of the plaintiff from the suit premises. It is his further contention that the lower appellate Court erred in interpreting the prayer clause in the counter claim to include the prayer for eviction, which in fact it does not contain such prayer.

8. Once the parties were fully aware of the issues involved in the matter and it was clear to the appellant that he was required to meet the case of the respondents on the point of his eviction from the suit premises and that being apparent from Issue No.19, it is obvious, as rightly submitted by learned Senior Counsel on behalf of the respondents, that the application for amendment was merely in the nature of clarifying the said position. Indeed it is true that the counter claim did not contain valuation of the relief for eviction of the plaintiff or restoration of the premises to the respondents. However, in that regard, certainly the Courts are empowered to insist for payment of court fee thereof after decretal of the suit and even prior to allowing the execution of such decree. The failure on the part of the respondent to value the relief for eviction or restoration that by itself will not indicate absence of issue in relation to eviction of the plaintiff. In the circumstances, the interpretation of the prayer clause of the lower appellate Court cannot be found fault with. It would have been perhaps appropriate for the lower appellate Court to deal with the challenge to the order passed by the trial Court rejecting the application for amendment before interpreting the prayer clause in the counter claim. However, merely because the lower appellate Court directly chose to interpret the prayer clause in the counter claim while dealing with the contention regarding the amendment to the prayer clause, that cannot give rise to any substantial questions of law or warrant interference of this

Court in exercise of the powers under Section 100 of C.P.C.

9. As regards the second point which relates to the nature of the transaction, perusal of the Judgments passed by the Courts below discloses detailed discussion on this aspect and taking into consideration of the entire evidence on record to arrive at the concurrent finding regarding nature of transaction being of licence and not lease. The learned Advocate appearing for the appellant has drawn my attention to the translation of Decree No.43525 (Sections 8-1 and 8-2) which read thus :-

“ Sec.8-1. Barring the provision contemplated in Sec.10, the lease shall be drawn up in writing, with the signature of the lessor and the lessee; if any of these is not able or does not know to write his signature, it shall be made on request with the attendance and signature of two witnesses in the presence of the notary public who certified it so and attests all the signatures.

The diplomas in force at present, in the part not contradicted by this decree, shall be complied with in respect of the matter.

2. With the exception of what is laid down in the second part of sub-section 3 of the same section, the lease shall be, notwithstanding the lack of written title, admitted in Court by any other means of evidence, when it is shown that the lack of

it is imputable to the lessor or to the lessee. ”

10. It is the contention of the learned Advocate that the receipt which was produced clearly disclose payment of rent. However, the lower appellate Court in relation to the said document has held that the same is cryptic and is not sufficient to decide the nature of transaction. Bare perusal of the said document would disclose that the finding by the lower appellate court cannot be found fault with. Besides clause 2 of Section 8 of Decree No.43525 clearly requires a party to justify in what circumstances the proper document of lease could not be executed and why reliance is sought to be placed on such cryptic document. Admittedly there are no pleadings by the plaintiff nor any evidence led by the appellant in this regard. Being so, what is sought to be contested in relation to the applicability of Decree No.43525 also do not arise for consideration in the matter.

11. Hence I do not find any justification for interference in the impugned decree in exercise of the powers under Section 100 of C.P.C. and therefore the Second Appeal is rejected.

R.M.S. KHANDEPARKAR, J.

sl.

